INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Dates of the judgment and date of application for appeal	2
Nature of the case	3
Cases believed to sustain jurisdiction	4
Appendix "A"—Per curiam opinion of the District Court	7

Table of Cases Cited

Interstate Commerce Commission v. *Hoboken Manufacturers R. Co.*, 64 S. Ct. 159, 320 U. S. 368, 88 L. ed. 107, 64 S. Ct. 516, 321 U. S. 801, 83 L. ed. 1086	4
U. S. v. *Baltimore & O. R. Company*, 68 S. Ct. 494, 333 U. S. 169, 92 L. ed. 618	4
U. S. v. *Hancock Truck Lines*, 65 S. Ct. 1003, 324 U. S. 774, 89 L. ed. 1357	4

Statutes Cited

Interstate Commerce Act, Part III, (49 U.S.C. 901 to 923)	3
United States Code, Title 28:	
Section 1253	1
Section 1336	2, 3
Sections 2281-84	3
Section 2321	2, 3
Section 2325	2, 3

IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action File No. 1742

RUSSELL V. WARNER AND GEORGE H. TAMBLE, A PARTNERSHIP DOING BUSINESS AS WARNER AND TAMBLE TRANSPORTATION COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appellees

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT OR DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, paragraph 1, the above appellants file this their statement showing the basis on which said appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the judgment and decree appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is section 1253 of title 28 of the United States Code, which provides that:

"Sec. 1253. *Direct appeals from decisions of three-judge courts.* Except as otherwise provided by law,

any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

By section 1336 of title 28 of the United States Code, it is provided:

"Except as otherwise provided by Act of Congress, the District Court shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

And by section 2321 of title 28 of the United States Code, it is provided.

"The procedure in the District Courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the claimant of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter [Chapter 157, title 28 U. S. Code]."

And by section 2325 of title 28 of the U. S. Code, it is provided:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title [Title 28]."

II. The judgment and decree appealed from was entered on the 4th day of October, 1950, and the application for appeal is presented on the 1 day of December, 1950.

III. This action was brought to set aside a final order of the Interstate Commerce Commission issued on May 17, 1949, on an application filed by applicants for a permit as a contract carrier by water, pursuant to that act of Congress approved September 18, 1940, known as Part III of the Interstate Commerce Act, reported at sections 901 to 923 of title 49 of the United States Code. The order of the Interstate Commerce Commission granted in part and denied in part the operating authority claimed and sought by applicants. All administrative remedies provided by Part III of the Interstate Commerce Act, *supra*, had been exhausted by appellants before institution of suit. By section 916 (a) of title 49 of the United States Code it is provided:

> "The provisions of section 12 and section 17 of chapter 1 of this title [Secs. 12 and 17 of title 49 U. S. C.] shall apply with full force and effect in the administration and enforcement of this chapter."

Section 17(9) of title 49, U. S. Code, provides:

> "When application for rehearing, re-argument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner or a Board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after re-hearing, re-argument, or re-consideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in the court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

Pursuant, therefore, to section 1336, sections 2281-2284 and sections 2321-2325 of Title 28, United States Code, appellant's action was brought to enjoin and set aside an

order of the Interstate Commerce Commission after all administrative remedies had been exhausted. The matter was heard by a three-judge court.

The ruling of the three-judge district court approved the order of the Interstate Commerce Commission and denied appellant's application to set aside said order and enjoin the enforcement thereof.

IV. Cases relied upon and believed to sustain jurisdiction are as follows:

Interstate Commerce Commission vs. *Hoboken Manufacturers R. Company*, 1943, 64 S. Ct. 159, 320 U. S. 368, 88 L. Ed. 107, rehearing denied 64 S. Ct. 516, 321 U. S. 801, 88 L. Ed. 1086.

U. S. vs. *Baltimore and O. R. Company*, 1948, 68 S. Ct. 494, 333 U. S. 169, 92 L. Ed. 618.

U. S. vs. *Hancock Truck Lines*, 1945, 65 S. Ct. 1003, 324 U. S. 774, 89 L. Ed. 1357.

V. Since prior to 1934 appellants and their predecessors have been actually and continuously engaged in interstate commerce as a contract carrier by water of commodities generally between points and ports located on the Mississippi River and its tributaries, including streams flowing into streams that flow into the Mississippi River; upon enactment of Part III of the Interstate Commerce Act, *supra*, on September 18, 1940, and within the time prescribed thereby, a "grandfather clause" application was filed with the Interstate Commerce Commission to grant to appellants a permit which would enable them to continue the interstate transportation by water in which they had been engaged.

The final order of the Interstate Commerce Commission, sought to be set aside and enjoined by appellants' action in a three-judge district court, and which was approved by

such court, granted in part and denied in part the operating authority sought by appellants, drastically curtailing the transportation heretofore performed by appellants commodity-wise, territorially-wise, and as well, materially restricted towing and leasing operation, depriving appellants of a substantial portion of their business and causing them irreparable injury.

It is contended that substantial questions are involved in the proper interpretation and application of Part III of the Interstate Commerce Act, *supra*, as well as of the powers of the Interstate Commerce Commission thereunder and that the Commission has acted unlawfully and exceeded the scope of its authority. One substantial question is whether the Commission is authorized to substitute a temporary exemption certificate for a permit to which an applicant is entitled as a matter of right; another, whether, as a matter of law, evidence of exempt transportation (subsequently determined administratively to be such) as well as of intrastate transportation may be entirely excluded from consideration in determining a water carrier's "grandfather rights"; another, whether, in determining a water carrier's "grandfather rights" the Commission may lawfully "atomize, molecularize and pulverize" evidence of the carrier's previous operations as to time, territory and commodities; further, whether the Interstate Commerce Commission on an interstate water carrier's "grandfather clause" application may lawfully freeze the carrier's future operations into the precise pattern of former operations, and whether it is incumbent upon the Interstate Commerce Commission, upon such application and proof of prior bona fide operations, as a matter of law to grant operating authority which will preserve substantial parity between future operations and prior bona fide operations, and whether the Commission may lawfully so restrict such an applicant's operating au-

thority as to deny to applicant that substantial parity between future operations and prior bona fide operations.

Another substantial question is whether Part III of the Interstate Commerce Act may be lawfully construed as to limit the granting of authority to transport a general class of commodities to common carriers by water and to prohibit the granting of such authority to contract carriers.

Appellants respectfully submit that the Interstate Commerce Commission erroneously determined each of the foregoing questions, and that the district court erred in affirming the action of the Commission.

VI. Appellants attach hereto copy of opinion handed down by the three-judge court on August 9, 1950, which was followed by findings of fact, conclusions of law and the entry of final judgment and decree on October 4, 1950.

Dated this 1 day of December, 1950.

Respectfully submitted,

JAMES W. WRAPE,
CHAS. H. HUDSON, JR.,
GLENN M. ELLIOTT,
1804 Sterick Building,
Memphis, Tennessee,
Counsel for Appellants.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

No. 1742—Civil

RUSSELL V. WARNER AND GEORGE H. TAMBLE, A Partnership, doing business as Warner & Tamble Transportation Company, *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Defendants*

Before Martin, Circuit Judge, and Darr and Boyd, District Judges

PER CURIAM: This cause came on to be heard on the complaint of the plaintiff praying a judgment annulling and setting aside an order of the Interstate Commerce Commission, dated May 17, 1949, and upon responsive pleadings of the defendants and intervenors, and upon the full record in the cause, including the report and order of the Interstate Commerce Commission, transcript of hearings before said Commission and exhibits filed and considered therein; and

The Court, being fully informed, is of the opinion that the Interstate Commerce Commission, in its report, made essential basic findings of fact, supported by substantial evidence; and that the order of the Commission is in all things lawful.

The complaint, accordingly, is dismissed with proper costs.

JOHN D. MARTIN,
Circuit Judge.
LESLIE R. DARR,
District Judge.
MARION S. BOYD,
District Judge.

A True Copy.
Attest:
W. LLOYD JOHNSON,
Clerk,
By S. M. SOUTHERLAND,
D. C.